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No. 83-1955

In The

Supreme Court of the United States

October Term, 1983

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DONALD J. HARMAN,

Plaintiff-Appellant,

v.

LACROSSE TRIBUNE, ROBERT D. JOHNS, DANIEL T. FLAHERTY, TERRY C. GILLETTE, ALAN C. COLE, ROBERT D. JOHNS, JR., GALEN W. PITTMAN, ROBERT GALLAGHER, GERARD O'FLAHERTY and KENNETH O. BLANCHARD,

Defendants-Appellees.

—o—

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

—o—

MOTION TO DISMISS AND MOTION TO AFFIRM OF DEFENDANTS-APPELLEES

—o—

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MOTION

Pursuant to Rule 16 of the United States Supreme Court Rules, defendants-appellees hereby move the Court to dismiss the appeal or, in the alternative, to affirm the rulings below.

STATEMENT OF THE CASE

The Jurisdictional Statement filed by plaintiff-appellant Harman (hereafter, the "appellant") contains many misstatements of fact and of the proceedings below.

The appellant brought this action against two groups of defendants. Both groups are private entities; no state action was alleged or proven. The defendants-appellees LaCrosse Tribune, Robert S. Gallagher and Kenneth O. Blanchard are a newspaper and the editor and publisher of the newspaper (hereafter, the "newspaper appellees"). The remaining defendants-appellees are attorneys at the LaCrosse, Wisconsin, law firm of Johns, Flaherty and Gillette, S.C. (hereafter, the "law firm appellees").

The appellant's lawsuit grew out of his dismissal from employment by the law firm appellees. Appellant was dismissed after he publicly stated that some newspaper employees had violated a Wisconsin criminal statute. Appellant made the accusation with the knowledge that the newspaper was a client of the law firm appellees and after being told that a member of the law firm appellees had advised the newspaper on the very publication which appellant claimed was criminal. (Memorandum Dec., App. at 123; Complaint, App. at 142). Appellant was dismissed after he went ahead with his accusation.

Appellant commenced this action alleging three theories of tort liability. First, he alleged that he was dismissed due to wrongful acts by the newspaper-appellees which constituted an intentional interference with contract. Second, he alleged wrongful discharge by the law firm appellees. Third, he alleged that his dismissal was

tortious because it infringed on his First Amendment free speech rights. (Complaint, App. at 136-156).

Following discovery, the Circuit court for LaCrosse County granted appellees motion for summary judgment as to all claims, holding that appellant had not satisfied the Wisconsin common law tort claims of intentional interference with contract or wrongful discharge, and that, assuming some state action in the promulgation of ethical rules for attorneys, the rules justifiably limited appellant's free speech rights. (Memorandum Decision, App. at 121-135).

The Wisconsin Court of Appeals affirmed, holding that appellant had no cause of action under Wisconsin's common law of torts and that no First Amendment tort was involved because there was no state action. *Harman v. LaCrosse Tribune*, 117 Wis.2d 448, 344 N.W.2d 536 (Ct. App. 1984); App. at 102-120. The Wisconsin Supreme Court denied appellant's petition to review. (App. at 101).

ARGUMENT

I. This Court Is Without Appellate Jurisdiction Because No State Laws Were "Drawn In Question" In The State Court Proceedings

A. In Order To Invoke Jurisdiction Under 28 U.S.C. § 1257(2), The Constitutionality Of A State Statute Must Have Been Challenged In The State Courts And Upheld Against Such A Challenge.

The appellant seeks to invoke jurisdiction of this Court under 28 U.S.C. § 1257(2). This statute provides the

Supreme Court with jurisdiction by appeal from the highest court of a state,

> where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties of laws of the United States, and the decision is in favor of its validity.

This court has strictly interpreted the statute. It must be clear from the face of the decisions being appealed that the "validity" of a state law was "drawn in question" on Constitutional grounds, and the state courts found the law to pass constitutional muster. *Honeyman v. Hanan,* 300 U.S. 14, 18-19 (1937); *Garrity v. State of New Jersey,* 385 U.S. 493, 495-96 (1967); *Cardinale v. Louisiana,* 394 U.S. 437 (1969). See generally, 12 *Moore's Federal Practice,* ¶510.01 (2d Ed. 1982).

B. The Validity Of A State Law Was Not Drawn In Question In The State Court Proceedings.

The decisions of the Wisconsin Circuit Court and Wisconsin Court of Appeals, *Harman v. LaCrosse Tribune,* 117 Wis.2d 448, 344 N.W.2d 536 (Ct. App. 1984), may be searched in vain to find any state laws being drawn into question. This was not mere oversight by the courts. Appellant never raised such an issue before them.

It is clear from appellant's complaint in this matter that he commenced this action as a common law tort action. He sought damages from two private entities and private individuals for claimed tortious conduct. Nowhere in his pleadings does appellant indicate that he is challenging the constitutional validity of any state laws. It is only now, after failing in his tort actions, that appellant attempts to raise the constitutionality of the rules of ethics

governing attorney's conduct in Wisconsin, rules which have been adopted by the Wisconsin Supreme Court as Chapter 20 of the Supreme Court Rules (SCR).

If it is not clear on the face of the pleadings and the court decisions that the constitutionality of those ethics rules was not drawn into question below, it is clear from the manner in which this case has proceeded. Under Wisconsin law, in any action which challenges the constitutionality of a state statute or rule adopted by a state agency, the party challenging the constitutionality of that statute must notify the Wisconsin Attorney General of the proceeding and serve papers on the Wisconsin Attorney General. *In Matter of Estate of Fessler,* 100 Wis.2d 437, 442, 443, 302 N.W.2d 414 (1981); *Wis. Stat.* §806.04(11) a copy of which is included as an appendix to this motion. Appellant never did so because appellant has never in fact challenged the constitutionality of those ethics rules. Appellant's failure to do so is also evident by his failure to comply with Rule 28.4(c) of the United States Supreme Court. That rule requires that, where a state statute is drawn into question, a party must raise the applicability of 28 U.S.C. § 2403. The federal rules, like the Wisconsin rules, require that the State Attorney General be given the opportunity to respond to any such challenge. Appellant's failure to notify the Attorney General underscores the fact that his action is simply a common law tort action and his so-called "constitutional" challenge is an after-the-fact attempt to raise a non-existing federal issue.[1]

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[1]Although no appeal will lie, the Court may treat the "appeal" as a petition for certiorari. 28 U.S.C. § 2103. For the reasons set forth in the remainder of this motion, should the court consider this as a petition for certiorari, the petition should be denied. Appellant has not raised any substantial issue under Rule 17 of the U.S. Supreme Court Rules.

As will be set out in detail below, appellant's action is grounded solely in Wisconsin common law of torts. This case raises no significant federal question.

II. This Appeal Presents No Substantial Federal Question But Solely Relates To The Wisconsin Common Law Of Torts

A. There Is No First Amendment Claim Against Private Parties.

Nowhere in appellant's filings is there any indication of *state action* which infringed on his rights. Appellant commenced and continued this action as a common law tort action against individual private parties. As such, no substantial federal question is presented. The issue solely relates to Wisconsin common law of torts.

Wisconsin does recognize the common law torts of wrongful discharge and intentional interference with contract. But the torts are limited to specific elements, see the discussion in *Harman, supra,* 117 Wis.2d at 452-456. In this case, after full review of appellant's case under Wisconsin's civil procedure statutes, the Wisconsin courts ruled that appellees had committed no tort. Where is the federal question?

Appellant's asserted constitutional issue is vague, at best. The only constitutional issue raised below was appellant's claim that the actions of these private individuals violated the First Amendment. This claim was disposed of quickly and properly by the Wisconsin Court of Appeals (117 Wis.2d at 452; App. at 106):

> The first amendment to the United States Constitution limits the acts of federal and state governments. It provides no protection against action by private persons. *Hudgens v. NLRB,* 424 U.S. 507, 513 (1976).

The remaining issues before the Wisconsin courts related to appellant's argument that his First Amendment interests satisfied one of the elements of his Wisconsin tort claims. That argument, rejected by the Wisconsin courts, raises *no* federal issue.

B. The Federal Constitution Does Not Require That Wisconsin Guarantee Appellant's Continued Private Employment Or His Cause Of Action In Tort Against Private Parties.

Appellant attempts to make a unique federal claim which should be rejected. It appears that appellant's unique claim is that, in essence, Wisconsin tort law must provide him a private cause of action if his constitutional rights were infringed by private parties. This is a novel proposition of law. Appellant fails to recognize that the Federal Constitution *limits acts by the state*, but does not *compel* tort theories against private parties. As long as *The Civil Rights Cases*, 109 U.S. 3, 11 (1883), this Court rejected the proposition that the states are compelled by the Constitution to adopt certain legal codes. Even where the state regulates a private entity—such as the ethics restrictions on the law firm appellee—this does not transform private action into state action.[2] This argument was specifically rejected in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 354 (1974), where the court states:

> Doctors, optometrists, *lawyers*, Metropolitan, and Nebbia's upstate New York grocery selling a quart of milk are all in regulated businesses . . . . We do not

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[2]The newspaper appellees, of course, are subject to no such regulation. Thus, even if some state action could be inferred by the law firm appellees, the appeal must be dismissed as to the newspaper appellees.

> believe that such a status converts their every action, absent more, into that of the State. (Emphasis added.)

Courts faced with the exact claim made by appellant have firmly rejected the alleged constitutional infringement. When private entities dismiss an employee, allegedly for the employee's exercise of guaranteed constitutional rights, the courts hold that such action by private entities does not infringe the Constitution. *Pavolini v. Bard-Air Corp.*, 645 F.2d 114, 147-48 (2d Cir. 1981); *Heiskala v. Johnson Space Center Federal Credit Union*, 474 F. Supp. 448, 450-53 (S.D. Texas 1979); *Rozier v. St. Mary's Hospital*, 88 Ill. App.3d 994, 411 N.E.2d 50, 54 (1980).

The cases cited by the appellant are inapposite, again indicating that appellant fails to distinguish between the Constitution *limiting* a state from acting and *compelling* a state to recognize a common law tort. Appellant's cited cases are similar to *New York Times v. Sullivan*, 376 U.S. 254 (1964). In *New York Times*, the Supreme Court held that the Constitution restricted states from *enforcing* private causes of action which would infringe on constitutional rights. This is not such a case. The State of Wisconsin has in fact refused to enter the fray between plaintiff and his former employers, indicating that Wisconsin tort law does not recognize a cause of action. In one case, the state's power is used to inflict injury on someone exercising their constitutional rights and the Constitution acts as a defense against that *state* action. In the other case, as in this one, the state simply refuses to act.

All the Wisconsin courts have done in this case is refused to expand the common law tort of wrongful discharge or interference with contract rights. Wisconsin

courts, under the federal system, have full authority to establish their common law of torts as they wish. The federal courts have no concern with that decision.

III. Even If Some First Amendment Interests Are At Issue, This Court Should Affirm The Decisions Below

This case would be in a different posture if the State of Wisconsin were proceeding against appellant for a violation of the ethics rules. Even then, the courts have ruled that the states may impose restrictions on attorney's First Amendment rights. *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978); *Kentucky Bar Assn. v. Heleringer*, 602 S.W.2d 165 (Kty. 1980), cert. denied, 449 U.S. 1101 (1981). The state's interest in regulating the bar, and assuring that lawyers will maintain loyalty to their clients, are more than adequate to justify the ethics rules adopted by Wisconsin. Therefore, even if some First Amendment issue were properly before this Court, the Court should affirm the rulings below.

CONCLUSION

Appellant ignores one hundred years of constitutional jurisprudence. Private entities, like appellees here, are not restricted by the First Amendment. They are subject to Wisconsin's tort rules, and the Wisconsin courts have found them not liable in this case. If appellant believes Wisconsin's attorney ethics rules violate federal rights, he has a full remedy against the appropriate *state* officials under *Wis. Stat.* § 806.04. But these appellees may not be

required to respond to appellant's dispute with the State of Wisconsin.

For the reasons set forth herein, the Court should dismiss the appeal, affirm the decision below or deny the appeal treated as a petition for writ of certiorari.

Respectfully submitted this 26 day of June, 1984.

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APPENDIX

Wis. Stat. § 806.04

806.04 Uniform declaratory judgments act. (1) Scope. Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

(2) Power to construe, etc. Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder. No party shall be denied the right to have declared the validity of any statute or municipal ordinance by virtue of the fact that the party holds a license or permit under such statutes or ordinances.

(3) Before breach. A contract may be construed either before or after there has been a breach thereof.

(4) Representatives, etc. Any person interested as or through a personal representative, executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, mental incompetent or insolvent, may have a declaration of rights or legal relations in respect thereto:

(a) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or

(b) To direct the personal representatives, executors, administrators or trustees to do or abstain from doing any particular act in their fiduciary capacity; or

(c) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

(5) Enumeration not exclusive. The enumeration in subs. (2), (3) and (4) does not limit or restrict the exercise of the general powers conferred in sub. (1) in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

(6) Discretionary. The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

(7) Review. All orders, judgments and decrees under this section may be reviewed as other orders, judgments and decrees.

(8) Supplemental relief. Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or de-

cree, to show cause why further relief should not be granted forthwith.

(9) Jury trial. When a proceeding under this section involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.

(10) Costs. In any proceeding under this section the court may make such award of costs as may seem equitable and just.

(11) Parties. When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration may prejudice the right of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, the municipality shall be made a party, and shall be entitled to be heard. If a statute, ordinance or franchise is alleged to be unconstitutional, the attorney general shall also be served with a copy of the proceeding and be entitled to be heard. In any proceeding under this section in which the constitutionality, construction or application of any provision of ch. 227, or of any statute allowing a legislative committee to suspend, or to delay or prevent the adoption of, a rule as defined in s. 227.01(9) is placed in issue by the parties, the joint committee for review of administrative rules shall be served with a copy of the petition and, with the approval of the joint committee on legislative organization, shall be made a party and be entitled to be heard. In any proceeding under this section in which the constitutionality, construction or application of any provision of ch. 13, 20, 111, 227 or 230 or subch. I, III or IV of ch. 16, subch.

VIII of ch. 40 or s. 753.075, or of any statute allowing a legislative committee to suspend, or to delay or prevent the adoption of, a rule as defined in s. 227.01(9) is placed in issue by the parties, the joint committee on legislative organization shall be served with a copy of the petition and the joint committee on legislative organization, the senate committee on organization or the assembly committee on organization may intervene as a party to the proceedings and be heard.

(12) Construction. This section is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.

(13) Words construed. The word "person" whereever used in this section, shall be construed to mean any person, partnership, joint stock company, unincorporated association or society, or municipal or other corporation of any character whatsoever.

(14) Provisions severable. The several subsections and provisions of this section except subs. (1) and (2) are declared independent and severable, and the invalidity, if any, of any part or feature thereof shall not affect or render the remainder of the statute invalid or inoperative.

(15) Uniformity of interpretation. This section shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees.

(16) Short title. This section may be cited as the "Uniform Declaratory Judgments Act".